

**Letter of Findings Number: 02-20190423
Corporate Income Tax
For Tax Years 2015-2017**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

S-corporation protested that the Department's determination of income was incorrect. S-corporation did not provide sufficient documentation to support its protest. Penalties were not waived.

ISSUES

I. Corporate Income Tax—Composite Tax Return.

Authority: IC § 6-3-4-13; IC § 6-8.1-5-1; [45 IAC 3.1-1-66](#); *Indiana Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests the imposition of corporate income tax assessments.

II. Tax Administration—Penalties and Interest.

Authority: IC § 6-8.1-10-2.1; [IC 6-8.1-10-1](#).

Taxpayer protests the imposition of penalties and interest.

STATEMENT OF FACTS

Taxpayer, an S-corporation, operates a retail business ("Business") with gasoline sales and an attached convenience store. Pursuant to a sales tax audit of Business, the Indiana Department of Revenue ("Department") determined that Taxpayer underreported its sales and income. In an audit for income tax, the Department determined that Taxpayer underreported income tax, failed to withhold Indiana adjusted gross income tax ("AGIT") on a non-resident shareholder, and failed to file composite returns for tax years 2015, 2016, and 2017. The Department therefore assessed corporate income tax, penalties, and interest for those years. Taxpayer protested this imposition of tax, penalties, and interest. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as needed.

I. Corporate Income Tax—Composite Tax Return.

DISCUSSION

Taxpayer protests the Department's proposed corporate income tax assessments for tax years 2015 through 2017. As the result of a related sales tax audit, the Department determined that Taxpayer had underreported taxable sales and therefore also had underreported additional income. Taxpayer argues that it properly filed all tax returns, which would wholly eliminate Taxpayer's liabilities.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867

N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 485 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

First, the Department refers to IC § 6-3-4-13, which states in relevant part(s):

(a) Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8](#)(2) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

- (1) *shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and*
- (2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.6](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.6](#), it is required to withhold.

...

(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes *any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.*

...

(j) A corporation described in subsection (a) shall file a composite adjusted gross income tax return on behalf of all nonresident shareholders. The composite return must include each nonresident shareholder regardless of whether or not the nonresident shareholder has other Indiana source income.

...

(Emphasis added).

Therefore, under IC § 6-3-4-13, a corporation must withhold AGIT on nonresident shareholders and file composite returns to reflect the withholdings. A corporation is liable for failing to withhold composite tax, and these liabilities are considered unpaid AGIT.

Further, [45 IAC 3.1-1-66](#) states, in relevant part:

Although Subchapter S corporations are generally not subject to adjusted gross income tax, they are subject to use tax and intangibles tax, and must report and pay such tax at the time the annual return is filed.

Subchapter S corporations must also withhold adjusted gross income tax on any nonresident shareholder's share of corporate income. (Emphasis added). (Internal citations omitted).

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail. (Emphasis added).

In the instant case, Taxpayer argues that Business properly filed all tax returns. The Department disagrees with Taxpayer's argument. First, Taxpayer was denied on the related sales tax protest, and total audited sales and income were not reduced. Second, Taxpayer provided no tax documentation to verify its claims. Third, Business is liable under IC § 6-3-4-13(a) because Business did not file the composite returns required by IC § 6-3-4-13(j). For those reasons, the Department is not convinced by Taxpayer's argument, and Taxpayer's liabilities are considered unpaid AGIT under IC § 6-3-4-13(d). Therefore, Taxpayer has not met the burden under IC § 6-8.1-5-1(c) of proving the proposed assessment wrong.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Penalties and Interest.**DISCUSSION**

Taxpayer protests the imposition of penalties and interest under IC § 6-8.1-10-2.1(h), (j) and IC § 6-8.1-10-1(a), respectively.

On penalties, IC § 6-8.1-10-2.1 states, in relevant part(s):

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

...
(f) The department shall adopt rules under [IC 4-22-2](#) to prescribe the circumstances that constitute reasonable cause and negligence for purposes of this section.

...
(h) A:

- (1) corporation which otherwise qualifies under [IC 6-3-2-2.8](#)(2);
- (2) partnership; or
- (3) trust;

that fails to withhold and pay any amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#) shall pay a penalty equal to *twenty percent (20 [percent]) of the amount of tax required to be withheld* under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#). This penalty shall be in addition to any penalty imposed by section 6 of this chapter.

...
(j) If a partnership or an S corporation fails to include all nonresidential individual partners or nonresidential individual shareholders in a composite return as required by [IC 6-3-4-12](#)(i) or [IC 6-3-4-13](#)(j), *a penalty of five hundred dollars (\$500) per partnership or S corporation is imposed on the partnership or S corporation.*

...
(*Emphasis added*).

Therefore, the Department only waives penalties on reasonable cause. Failure to withhold composite tax incurs a twenty percent penalty, and failure to file composite returns incurs a \$500 penalty.

In the instant case, the Department disagrees with Taxpayer's argument. Taxpayer failed to file composite returns as required by IC § 6-3-4-13(j), which incurred the \$500 penalty under IC § 6-8.1-10-2.1(j). Further, as established in the sales tax audit, Taxpayer failed to accurately withhold on the proper amount of income as required by IC § 6-3-4-13(a), which incurred the twenty percent penalty under IC § 6-8.1-10-2.1(h). While Taxpayer was denied on the related sales tax protest, even if the protest was sustained and no additional sales were applied, meaning that there would be no additional income to tax, the fact remains that Taxpayer failed to file composite returns for the income it acknowledges was paid to its non-resident shareholder. This alone warrants the imposition of the \$500 penalty. Finally, IC § 6-8.1-10-1(e) prevents the Department from waiving interest. Therefore, Taxpayer has not established reasonable cause for its failure to perform its filing duties. Waiver of penalties is not warranted under IC § 6-8.1-10-2.1(d).

FINDING

Taxpayer's protest is denied.

SUMMARY

Taxpayer's protests of the proposed corporate income tax, penalty, and interest assessments are denied.

August 13, 2019

